Before the FEDERAL COMMUNICATIONS COMMISSION Washington, D.C. 20554

In the Matter of)	
)	
Media Bureau Seeks Comment on)	MB Docket No. 10-56
Whether Comcast-NBCU Benchmark)	
Condition Needs Clarification and Whether)	
A Proposed Third Protective Order for)	
Compliance Should be Adopted)	

JOINT OPPOSITION TO COMCAST-NBCU REQUEST FOR CLARIFICATION REGARDING THE BENCHMARK CONDITION

SUBMITTED BY:

CBS CORPORATION
NEWS CORPORATION
SONY PICTURES ENTERTAINMENT INC.
TIME WARNER INC.
VIACOM INC.
THE WALT DISNEY COMPANY

Dated: April 3, 2012

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CBS Corporation, News Corporation, Sony Pictures Entertainment Inc., Time

Warner Inc., Viacom Inc., and The Walt Disney Company (together, and on behalf of their

affiliated businesses, the "Content Companies") respectfully submit these comments in response
to the Commission's *Public Notice*¹ and in opposition to the *Request for Clarification Regarding*Disclosure of Peer Deals and Third Protective Order to Govern Negotiations Under Benchmark

Condition filed by Comcast Corporation ("Comcast") and NBCUniversal Media, LLC ("NBCU")

(collectively "C-NBCU").²

Although they have been drawn unwillingly into this matter through no action of their own, the Content Companies' interests are severely threatened by the C-NBCU Proposal.

The Content Companies have no stake in the outcome of negotiations between C-NBCU and any online video distributor ("OVD"), nor do the Content Companies submit these comments to take

See In re Media Bureau Seeks Comment on Whether Comcast-NBCU Benchmark Condition Needs Clarification and Whether a Proposed Third Protective Order for Compliance Should be Adopted, Public Notice, MB Docket No. 10-56; DA 12-394 (rel. Mar. 13, 2012) ("Public Notice").

Letter from David P. Murray, Counsel to C-NBCU, to William T. Lake, Chief, Media Bureau, Request for Clarification Regarding Disclosure of Peer Deals and Third Protective Order to Govern Negotiations Under Benchmark Condition, MB Docket No. 10-56 (filed Feb. 17, 2012) (the "C-NBCU Proposal").

any position with respect to the merits of any pending or future dispute. Rather, they are filing these comments for the sole and limited purpose of objecting to the disclosure of their own highly confidential and extremely sensitive business contracts. As demonstrated herein, the C-NBCU Proposal not only would result in grave harm to the Content Companies and the marketplace for video programming, but also would contravene sound Commission precedent as well as Federal law expressly designed to protect private business information against the threat of undue disclosure.

I. INTRODUCTION AND SUMMARY

Programming contracts contain the Content Companies' most sensitive business data and information. They include highly proprietary and carefully protected terms and conditions, including pricing information, which lie at the heart of how the Content Companies compete and conduct their businesses. C-NBCU repeatedly has recognized just how critically important it is to protect this type of information when it comes to its own agreements. Just last year, in a proceeding in which Comcast was, like the Content Companies here, an innocent third party dragged into a dispute between an unrelated programmer and an unrelated cable operator, Comcast took the position that the FCC was obligated "to protect third parties from unauthorized, highly invasive and potentially harmful discovery of their highly confidential information." Yet in the C-NBCU Proposal, Comcast and NBCU propose to (i) dramatically expand the scope of individuals who would gain access to the Content Companies' highly confidential business information and (ii) precipitously alter the circumstances and timing under which access to third parties' information would be made available. The result would be a substantially harmful

In re Joint Petition For Declaratory Ruling That The Liberty Order Does Not Authorize Third-Party Subpoenas, filed by Comcast Corporation, DirecTV, Inc. and News Corporation, MB Docket No. 11-14 (submitted Jan. 12, 2011) (the "Joint Petition for Declaratory Ruling"), at 10.

impact on the businesses of the Content Companies, who are not parties to this proceeding, and on the competitive online video marketplace. Neither aspect of the C-NBCU Proposal can be approved as a matter of law, and both components of the Proposal conflict so sharply with the Commission's efforts to foster and protect competition that the Commission should deny the C-NBCU request in its entirety.

First, the C-NBCU Proposal is an untimely petition for reconsideration masquerading as a request for clarification. Comcast and NBCU consummated their transaction in 2011 on the basis of a *Merger Order* that clearly and unequivocally provided for binding commercial arbitration as the solution to a bargaining impasse. C-NBCU's efforts to re-cut the deal now are wholly out-of-time, given that a petition for reconsideration of the *Merger Order* was due February 21, 2011, more than one year ago. Moreover, C-NBCU seeks relief from the Media Bureau that the Bureau is without power to provide; since the *Merger Order* was a full Commission decision, any action to set aside or alter the fundamental terms of the *Merger Order* can be taken only by the full Commission.

Second, even if the Commission were to put aside these procedural infirmities and review the C-NBCU Proposal on its merits, it still should find that sound policy reasons warrant denial of the request. The Content Companies treat programming agreements with the highest level of confidentiality afforded to any of their business contracts. They typically insist on rigorous confidentiality provisions intended to restrict disclosure of the terms of these agreements, and they steadfastly seek to prevent any of the information contained in these materials from becoming available to anyone other than the counter-parties to the contracts. Even with respect to counter-parties, contract terms often limit access to "need to know" personnel only. Disclosure of the closely guarded terms and conditions contained in these

agreements would inflict significant business harm, would place the Content Companies at a considerable competitive disadvantage and, at the same time, would undermine the very purposes of the order approving the Comcast/NBCU merger – enhancing competition.

Indeed, if the Commission were to accede to C-NBCU's request, highly confidential information would be viewed by internal C-NBCU business personnel – potentially the same individuals with whom the Content Companies' businesses regularly must negotiate with respect to content distribution and with whom they also compete when it comes to the creation and acquisition of that content. The so-called "Benchmark Condition" was placed on C-NBCU as the result of the Commission's review of the merger to ensure that the large, vertically integrated video distributor and content provider would not impair competition. By its Proposal, C-NBCU now seeks to turn regulatory straw into anti-competitive gold. If the Proposal is granted, C-NBCU would have access to information that NONE of its distribution or content competitors possesses. Furthermore, C-NBCU's request would result in the constant and ongoing dissemination of highly confidential information each and every time an OVD invokes the Benchmark Condition, rendering meaningless the concepts of good faith negotiation and arbitration established in the *Merger Order*. S

Finally, both the Bureau and the full Commission are barred by Federal statutes from granting C-NBCU's request – to wit, the Trade Secrets Act (which prohibits government personnel from disclosing sensitive business data unless "authorized by law" to do so) and the

See In re Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., for Consent to Assign Licenses and Transfer Control of Licensees, 26 FCC Rcd 4238 (2011) (the "Merger Order"), at Appendix A.

⁵ See id.

Administrative Procedure Act (which precludes the FCC from changing course absent a reasoned explanation and from acting arbitrarily and capriciously in its decision-making).

Just as important, despite its protestations to the contrary, there is no need for the dramatic relief that C-NBCU seeks. C-NBCU's own filings with the Commission confirm that it can, and already has, "negotiated and executed license agreements with several OVDs on mutually agreeable commercial terms" without need for the relief sought in the C-NBCU Proposal.⁶ Likewise, the Commission already contemplated that binding commercial arbitration should serve as the safety valve for a circumstance when NBCU and an OVD reach a bargaining impasse with respect to a program rights negotiation. Thus, C-NBCU's efforts to portray the current *status quo* as untenable are unfounded. C-NBCU has not demonstrated that there is anything close to an "urgent[]" need for action, and it certainly has not shown that its requested relief would be appropriate in light of the severe anti-competitive consequences that would ensue. It would be extraordinarily inequitable for the Commission to order broad disclosure here, when its actions would implicate the rights of *third parties* like the Content Companies, which have not sought anything from the FCC and which have not placed their own business dealings at issue.

For all of these reasons, the Content Companies respectfully request that the Commission deny the C-NBCU Proposal in its entirety.

In re Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., Annual Report of Compliance with Transaction Conditions (filed Feb. 28, 2012), at 9 (the "Annual Compliance Report").

In re Media Bureau Seeks Comment on Whether Comcast-NBCU Benchmark Condition Needs Clarification and Whether a Proposed Third Protective Order for Compliance Should be Adopted, Comcast/NBCU Opposition to Motion for Extension of Time, MB Docket No. 10-56 (filed Mar. 19, 2012), at 2.

II. THE C-NBCU PROPOSAL IS AN UNTIMELY PETITION FOR RECONSIDERATION MASQUERADING AS A 'REQUEST FOR CLARIFICATION,' WHICH IN ANY EVENT SEEKS RELIEF THAT THE MEDIA BUREAU LACKS AUTHORITY TO PROVIDE

C-NBCU styles its February 17, 2012 letter to the Media Bureau as a "Request for Clarification Regarding Implementation of the Benchmark Condition." In reality, the letter more accurately should be considered an out-of-time petition for reconsideration of the *Merger Order*. C-NBCU is seeking far more than a "clarification"; it desires that the Bureau grant it nothing less than a complete transformation, with respect to both breadth and timing, of the limited right of access to information that the FCC contemplated in the *Merger Order* – a transformation in fact that would undermine key provisions expressly included in the *Merger Order*. For at least two separate reasons, the Bureau is without power to grant this request.

First, the Communications Act (the "Act") mandates that petitions for reconsideration of a final Commission action *must* be filed *with the Commission* within 30 days following public notice of the action in question.⁸ As the U.S. Court of Appeals for the D.C. Circuit has noted, Section 405's time limit is mandatory, and can be extended only in extraordinary circumstances such as "where the late filing is in some sense attributable to a procedural violation by the Commission." Here, C-NBCU has claimed no procedural defect by

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See 47 U.S.C. § 405(a) (petition for reconsideration of order is filed "only to the authority making or taking the order . . . [and] *must* be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of") (emphasis supplied); 47 C.F.R. § 1.106(f) (same).

National Black Media Coalition v. FCC, 760 F.2d 1297 (D.C. Cir. 1985); see also Reuters Ltd. v. FCC, 781 F.2d 946, 950, 952 (D.C. Cir. 1986) (noting that 30-day period for filing reconsideration petitions with FCC is mandated by statute and regulation, and "it is elementary that an agency must adhere to its own rules and regulations").

the FCC to justify the late filing. It is instead attempting to obtain now relief that it could only have sought by filing a timely petition for reconsideration on or before February 21, 2011.¹⁰

C-NBCU's request is – at its very essence – a petition for reconsideration of the *Merger Order*. The label on its request notwithstanding, C-NBCU's application for relief does *not* seek a "clarification." There is nothing ambiguous about the *Merger Order* or the full Commission's expectations that needs to be "clarified" when it comes to the Benchmark Condition. The FCC expressly set forth the limited set of circumstances in which highly confidential materials – which in the C-NBCU merger and a long line of Commission decisions included programming agreements – may be produced. Those circumstances did *not* include production of highly confidential materials outside of an arbitration proceeding, nor did the Commission authorize production *at any time* to any C-NBCU in-house business personnel.

Thus, what C-NBCU really seeks is a substantive change from the approach established in the *Merger Order*. No amount of artful titling can obscure the fact that C-NBCU's letter, when stripped to its core, states with particularity the ways in which C-NBCU thinks that the *Merger Order* should be changed. But having filed its request nearly one year late, C-NBCU is not entitled to the relief that it seeks. It cannot demonstrate that there has been any material change in circumstance, nor does it even attempt to present facts that it was unable to discover

See In re Improving Public Safety Communications in the 800 MHZ Band, 22 FCC Rcd 17209, 17212 (2007) ("Although characterized as a request for 'clarification,' Sprint's petition in fact seeks a substantive change In substance, therefore, Sprint's request constitutes a request for reconsideration, and as such, it is procedurally defective because it is untimely"); see also In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, 18 FCC Rcd 7615, 7618 (2003) (internal citation omitted) ("[t]he statutory deadline for filing reconsideration petitions would be rendered meaningless if it could be circumvented by styling the pleading as a petition for rescission").

and present to the Commission during the exhaustive review of the C-NBCU transaction. The Bureau therefore must dismiss the C-NBCU Proposal without considering it on the merits.¹¹

Second, the Act makes clear that the Media Bureau can exercise only those functions that have been delegated to it by the full Commission. The FCC's rules implementing the Act stress that the Bureau must refer to the full Commission "[m]atters that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines." Neither the Act nor the FCC's rules permits the Bureau to take an action that would modify an order issued by the Commission sitting *en banc*. 14

Here, C-NBCU requests that the Bureau command OVDs that avail themselves of the Benchmark Condition to produce the OVDs' private commercial agreements with the Content Companies – both outside the context of any arbitration and to C-NBCU business personnel. In the *Merger Order*, however, the full Commission required that good faith negotiations be the starting point for C-NBCU and OVDs that seek to use the Benchmark Condition. In doing so, the FCC said nothing about compelling an OVD to produce highly confidential programming agreements during these negotiations, let alone about allowing C-NBCU employees to review them. Rather, the Commission focused on the transaction's

Although the *Merger Order* contemplates that C-NBCU may petition the Commission for modification of a condition, not even C-NBCU asserts that there has been the requisite "material change in circumstances," or that any condition has proven "unduly burdensome, such that [it] is no longer necessary in the public interest." *Merger Order*, 26 FCC Rcd at Appendix A, Section XX, n.11.

¹² See 47 U.S.C. § 155(c).

¹³ 47 C.F.R. § 0.283(c).

See In re Sandwich Isles Commc'ns, Inc., 20 FCC Rcd 8999 (2005) ("The Bureau does not have the authority to alter the Commission's finding"); In re: Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo, PC, 17 FCC Rcd 16100, 16102 (2002) ("It is axiomatic that a delegated authority decision cannot conflict or otherwise reverse the decision of the full Commission").

potential for competitive harms, and "developed a number of targeted, transaction-related conditions" to neutralize those perceived harms.¹⁵

In particular, the FCC contemplated that if C-NBCU and an OVD were to reach a bargaining impasse, either with respect to whether an OVD was "qualified" under the Benchmark Condition or what the fair market value was for contested programming rights, the OVD could pursue binding arbitration. In an arbitration proceeding, but only if ordered by the arbitrator in such a proceeding, the Commission found that it might be appropriate for an OVD to produce highly confidential materials. Even then, any highly confidential materials produced would be subject to a stringent protective order that, among other things, would absolutely forbid any in-house C-NBCU employee from viewing or accessing the highly confidential information.¹⁶

If the Commission had desired to permit access to these highly sensitive materials at any other time, or by any individuals other than outside counsel and outside experts, surely it would have said so somewhere in its comprehensive, 279-page *Merger Order*. That it did not say so should be a conclusive signal that a Media Bureau grant of the C-NBCU Proposal would be *ultra vires*. The Bureau simply does not have the power to set aside a decision made by the full Commission. At the very least, in light of the anti-competitive implications of the C-NBCU Proposal, which run directly counter to the provisions adopted in the *Merger Order*, the Bureau should not permit C-NBCU to lure it beyond its delegated powers by addressing novel questions that only the full Commission legally may consider.

¹⁵ Merger Order, 26 FCC Rcd at 4240.

¹⁶ Id. at Appendix A. To be clear, the Content Companies reserve their right to argue that even an arbitrator in this context would lack authority to abrogate the confidentiality provisions of private contracts, particularly contracts of third parties who are not participants in the arbitration.

III. BECAUSE PROGRAMMING AGREEMENTS CONTAIN HIGHLY-SENSITIVE AND COMPETITIVE INFORMATION, FEDERAL LAW DEMANDS THAT THE CONFIDENTIALITY OF THESE CONTRACTS BE RESPECTED

A. Disclosure of Programming Agreements Would Cause Irreparable Damage to the Content Companies' Business Interests and Would Scuttle the FCC's Effort to Protect Competition in the Video Marketplace

Congress long has recognized the vital importance of preserving the confidentiality of businesses' trade secrets and sensitive commercial information, ¹⁷ and the FCC has a long history of respecting this charge. ¹⁸ As the Commission has acknowledged, "disclosure of programming contracts between multichannel video program distributors and programmers can result in substantial competitive harm to the information provider." Even Comcast itself has pointed out to the Commission in other proceedings that program carriage agreements are highly proprietary and extremely sensitive documents. ²⁰ They are maintained in the strictest confidence and typically contain rigorous confidentiality and non-disclosure provisions that prohibit the parties to the contracts from revealing the specific contents of the agreements. Disclosure of the substantive terms and conditions contained in these contracts

See, e.g., Dep't of Justice, Protecting Business Information, FOIA Update, Vol. IV, No. 4 (1983), at http://www.justice.gov/oip/foia_updates/Vol_IV_4/page1.htm ("When the FOIA was enacted, Congress recognized the need to protect confidential business information, emphasizing that a federal agency should honor the promises of confidentiality given to submitters of such data because 'a citizen must be able to confide in his government.' H.R. Rep. No. 1497, 89th Cong. 2d Sess. 10 (1966)").

See In re Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, 13 FCC Rcd 24816, 24852 (1998) (the "1998 Policy Statement"); see also In re Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, 11 FCC Rcd 12406 (1996) (the "1996 Policy Statement NPRM").

¹⁹ See 1998 Policy Statement, 13 FCC Rcd at 24852.

See, e.g., In re Wavedivision Holdings, LLC; Horizon Cable TV, Inc.; Stanford University; and City of San Bruno, California v. Comcast, et al., 25 FCC Rcd 2231, 2232 (2010).

would inflict significant harm on the Content Companies and on competition in the burgeoning online video marketplace.²¹

That these severe harms would be inflicted on the Content Companies, when they are merely innocent bystanders to this proceeding, makes the C-NBCU request all the more inequitable. As the *Public Notice* makes clear, the Commission is considering the Proposal as a step to resolve a dispute between C-NBCU, on the one hand, and OVDs, on the other hand. The Content Companies are not parties to the controversy, nor have they sought (nor are they seeking) any FCC action or benefit. Quite the contrary, they have been dragged into this matter against their will, solely because the Commission arbitrarily defined the class of C-NBCU "peers" to include the specific entities that comprise the Content Companies' group. Given the intensity of the harms, the FCC should be especially sensitive about potentially damaging companies that are not parties to the negotiations at issue and that find themselves in the line of fire even though they have not availed themselves of any FCC right or remedy.

If C-NBCU were to access some or all of the information contained in third parties' program carriage contracts, it would have an enormous advantage over those third parties. As an online programming distributor, C-NBCU would be able to use its knowledge of the terms of the third parties' agreements to wield extraordinary leverage against other content

(filed July 21, 2010).

This is not the first time that the Content Companies have expressed serious concern with disclosure of their confidential programming agreements in the context of the Comcast-NBCU merger. During the Commission's review of the merger, representatives of five of the six Content Companies met with Commission staff to discuss the importance of limiting access to their program carriage agreements, even with respect to those outside counsel and experts who were subject to a protective order adopted by the FCC. *See* Letter from Jared S. Sher to Marlene H. Dortch, Secretary, FCC, filed on behalf of News Corporation, Discovery Communications, Inc., Scripps Networks Interactive Inc., The Walt Disney Company, CBS Corp., the National Association of Broadcasters, Time Warner Inc., Viacom Inc., and Univision Communications Inc., MB Docket No. 10-56

²² See Public Notice, at 1.

²³ See Merger Order, 26 FCC Rcd at Appendix A.

producers, including businesses owned by the Content Companies, when Comcast acquires programming for its own platforms. At the same time, NBCU would glean insight into what competing content companies are charging OVDs, thereby gaining a strategic advantage of its own.

Not only would the Content Companies suffer potentially serious consequences to their own businesses, but OVDs who might attempt to utilize the Benchmark Condition would be hamstrung in their ability to compete in the online video market. OVDs might find other content producers reluctant to license product in this environment. Even an OVD that reaches a deal with one of the Content Companies, and thereby becomes "qualified" to invoke the Benchmark Condition, would find it exceedingly difficult to negotiate with C-NBCU based on marketplace considerations. If given access to all of the terms and conditions of the OVD's other deals prior to starting negotiations, C-NBCU would simply select the most advantageous terms for itself, leaving the OVD with no prospect of achieving a better deal out of negotiations with C-NBCU than the OVD obtained from one of the Content Companies.

All of these harms ultimately would affect consumers, who would face fewer choices or higher prices – or both – when seeking access to programming online. In sum, the contemplated disclosures would have a substantial adverse effect on the competitive marketplace.²⁴

Indeed, even before the Benchmark Condition was adopted, representatives of the Content Companies told the Commission about their concern that this type of requirement, where a single OVD agreement automatically results in a requirement that C-NBCU make similar content available on similar terms, would affect and distort the marketplace negotiations of independent third parties for online distribution of video programming. See, e.g., Letter from Susan L. Fox, The Walt Disney Company, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (filed Jan. 14, 2011). Granting C-NBCU's Proposal only would serve to exacerbate this distortion.

Equally significant, because confidential commercial information is the lifeblood of any business, ²⁵ competition and antitrust laws place a premium on safeguarding this data as a key mechanism in protecting competitive economic markets. These laws, including the Sherman Act, have long reflected concern over the sharing of confidential price and terms of contracts among competitors, which could result in collusion, price fixing and other conspiracies in restraint of trade. ²⁶ It would make no sense to permit C-NBCU to subvert antitrust principles by allowing its business personnel to demand the exact types of information from OVDs that C-NBCU would be limited by the antitrust laws from seeking directly from the Content Companies. ²⁷ These competition principles bolster the notion that confidential programming agreements deserve extraordinarily strong protection.

The resulting harm from disclosure of the terms and conditions of programming agreements would be irreversible. Even if the Commission were to attempt to mandate that information be used for limited, non-competitive purposes, and even if it imposed *ex post facto* sanctions for any violations, the FCC could never mitigate the damage to the Content Companies' businesses and to competition. This would be true whether a disclosure was intentional or inadvertent. Indeed, once an individual gains access to confidential information,

²⁵ See, e.g., Wachovia Securities, L.L.C. v. Stanton, 571 F.Supp.2d 1014, 1039 (N.D. Iowa 2008); In re Cross Media Marketing Corp., No. 06 Civ. 4228(MBM), 2006 WL 2337177, at *2 (S.D.N.Y. Aug. 11, 2006).

See 15 U.S.C. § 1. In a related context, the Federal Trade Commission has been vigilant in opposing state laws that would compel disclosure of certain prescription drug costs, expressing deep concern that "[i]f pharmaceutical manufacturers, pharmacists, and pharmacies gain access to whatever information" state government requires be shared, "they could have access to competitively sensitive information, potentially facilitate collusion, and increase prescription drug prices" to the detriment of consumers. See e.g., Letter from Susan S. DeSanti, Director, Office of Policy Planning, Federal Trade Commission, to The Honorable Mark Formby, Mississippi House of Representatives (dated March 22, 2011).

See Douglas J. Leary, Business Due Diligence Strategies, 2011 WL 2115894, at *5 (2011 ed.) ("As it relates to the sharing of competitively sensitive information (e.g., pricing, discounts, profit margins, new products, marketing strategies, planned dispositions, significant customers), a primary concern is that, if a transaction does not occur, competitors will be in a better position to engage in anti-competitive behavior because of the information they have shared").

that knowledge cannot be erased. Even an individual's best efforts could not prevent him or her from being influenced by the information obtained from viewing confidential materials. In fact, as Federal courts have observed in related contexts, once a person sees information there is a high risk of inadvertent use because a person cannot "perform a prefrontal lobotomy on himself or herself."²⁸

These concerns are not merely theoretical. The Commission spent a considerable amount of time reflecting on just how realistic – and severe – the competitive harms would be, when it analyzed the proposed merger of Comcast and NBCU. "This transaction would effectuate an unprecedented aggregation of video programming content with control over the means by which video programming is distributed to American viewers offline and, increasingly, online as well. The harms that could result are substantial." As a result, the Commission adopted a set of conditions intended to ward off the perceived harms that a combined Comcast-NBCU could pose to the online video marketplace. C-NBCU's proposed overhaul of the Benchmark Condition would exacerbate, rather than mitigate, the potential adverse effects on competition identified by the Commission in the *Merger Order*.

Given its way, C-NBCU would be entitled to demand production of confidential agreements each and every time an OVD invokes the Benchmark Condition, thereby enabling C-NBCU to gather more and more data points from more and more of the Content Companies.

Over time, this aggregation of data would augment C-NBCU's ability to use the information for anti-competitive purposes against all programmers with which it negotiates for online

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AMP, Inc. v. Fleischhacker, 823 F.2d 1199, 1201 (7th Cir. 1987) (citing Fleming Sales Co., Inc. v. Bailey, 611 F.Supp. 507, 514 (N.D. Ill. 1985); Autotech Tech. Ltd. P'ship v. Automationdirect.com, Inc., 237 F.R.D. 405, 408 n.3 (N.D. Ill. 2006).

²⁹ *Merger Order*, 26 FCC Rcd at 4240.

distribution. And C-NBCU in-house personnel, including "essential business persons with executive management and negotiating responsibilities," would be among those permitted to review the confidential materials. These may include the same individuals who sit across from the Content Companies' businesses when they conduct their own online carriage negotiations; it would be profoundly unfair if the government granted these C-NBCU executives a unilateral advantage to enter those negotiations with knowledge of their adversaries' commercially-sensitive information.

In short, the Content Companies respectfully submit that there are sound public policy bases for denying the C-NBCU Proposal.

B. The FCC Is Prohibited By the Trade Secrets Act From Mandating the Disclosure of the Content Companies' Confidential Agreements

Federal law mandates that agencies behave cautiously in connection with confidential business information. In particular, the Trade Secrets Act³¹ prohibits government personnel from disclosing sensitive business data unless "authorized by law" to do so. It is axiomatic that administrative agencies can exercise only the authority delegated to them by Congress.³² And what the FCC cannot do directly, it likewise cannot accomplish indirectly (*e.g.*, by ordering an OVD to release sensitive and confidential private agreements that the Commission itself lawfully could not release).³³

The central question under the Trade Secrets Act is whether a disclosure of highly confidential business information is "authorized by law," as required by Section 1905. If not,

³⁰ C-NBCU Proposal, at 4.

³¹ 18 U.S.C. § 1905 ("Section 1905").

³² Am. Library Ass'n v. FCC, 406 F.3d 689, 691, 698 (D.C. Cir. 2005).

Nat'l Res. Def. Council Inc. v. EPA, 683 F.2d 752, 763 n.23 (3d Cir. 1982) (refusing to "allow an agency to do indirectly what it cannot do directly").

disclosure is forbidden.³⁴ An agency's disclosure decision is "authorized by law" under the Trade Secrets Act if the disclosure takes place pursuant to a regulation that: (i) is substantive in that it affects individual rights and obligations, (ii) is rooted in a grant of power by Congress and (iii) was promulgated in conformance with any procedural requirements established by Congress, such as those found in the Administrative Procedure Act.³⁵ In the context of the C-NBCU Proposal, the types of disclosures contemplated by C-NBCU are not "authorized by law" within the meaning of the Trade Secrets Act.

There is no FCC regulation authorizing or even contemplating the compelled disclosure of confidential information by one private entity to another, let alone mandating one entity to disclose a *third party*'s confidential materials to one of its chief competitors. Nor has C-NBCU suggested otherwise in its February 17 letter. Yet this is just the result that would arise under the C-NBCU Proposal. In the absence of a regulation "rooted in a grant of power by Congress," and unless the requisite regulation is "promulgated in accordance" with the APA, the Commission would not be "authorized by law" under *Chrysler* to grant CNBU's request.

To the extent that the FCC would seek to rely upon Section 0.457 of its rules, at most that provision authorizes disclosure of materials that have been submitted to the Commission. The Content Companies do not believe, however, that even Section 0.457 qualifies under *Chrysler* as authorized by law. The only court decision addressing the question was an obscure opinion by a District Court not selected for publication in the Federal Supplement; that opinion offered only a conclusory statement as to whether Section 0.457 qualified under

See Chrysler Corp. v. Brown, 441 U.S. 281, 318 (1979) ("[W]e believe any disclosure that violates § 1905 is 'not in accordance with law' within the meaning of' the Administrative Procedure Act ("APA")).

³⁵ See 1998 Policy Statement, 13 FCC Rcd at 24820-24821; 1996 Policy Statement NPRM, 11 FCC Rcd at 12413 (citing Chrysler, 441 U.S. at 301-303).

Chrysler.³⁶ Certainly no appellate court has ever upheld this provision as sufficient for purposes of the Trade Secrets Act, and the only appellate court before which the issue has been raised refused to address the merits because the petitioner failed to preserve the issue below.³⁷

Moreover, confidential programming agreements contain precisely the types of information that the Trade Secrets Act shields from competitors' Freedom of Information Act ("FOIA") requests. Under D.C. Circuit precedent, the Trade Secrets Act "requires each agency to withhold any information [that] it may withhold under Exemption 4 [*i.e.*, the trade secrets exemption]" of FOIA. Exemption 4 covers the contractual terms and pricing information that is contained in all of the Content Companies' agreements with OVDs. As described above, these agreements are highly confidential, and they would be exempt from disclosure under FOIA if held by the FCC under Section 0.457 of the FCC's rules. In connection with FOIA requests, "generally when a party succeeds in demonstrating that its materials fall within Exemption 4, the government is precluded from releasing the information by virtue of the Trade Secrets Act. Congress has commanded the FCC to avoid disclosing highly confidential competitive information under FOIA unless explicitly "authorized by law" to do so; the Commission should

See 1996 Policy Statement NPRM, 11 FCC Rcd at 12414 (citing Northern Television v. FCC, No. 79-3468, 1 Gov't Disclosure Serv. (P-H) ¶80,124 (D.D.C. Apr. 18, 1980)).

See Bartholdi Cable Co. v. FCC, 114 F.3d 274, 281-82 (D.C. Cir. 1997) ("Bartholdi argues that Section[] 0.457 of the Commission's regulations does not meet the definition of 'authorized by law' under Chrysler.... Because Bartholdi failed to challenge the validity of Section[] 0.457 before the Commission, we decline to consider the issue"). Notably, neither Bartholdi nor any other published judicial decision has ever relied upon Northern Television.

³⁸ Canadian Commercial Corp. v. Dep't of the Air Force, 514 F.3d 37, 39 (D.C. Cir. 2008). See also, e.g., Dowty Decoto v. Dep't of Navy, 883 F.2d 774, 776 (9th Cir. 1989) (affirming district court's issuance of injunctive relief under APA to bar disclosures that the Trade Secrets Act would not permit).

³⁹ Canadian Commercial Corp., 514 F.3d at 41-42. See also 5 U.S.C. § 552(b)(4).

⁴⁰ *Bartholdi*, 114 F.3d at 281.

not allow the C-NBCU Proposal to subvert this command, especially in the absence of an explicit statutory or regulatory authorization.

* * *

For all of these reasons, the Commission should not – and under law cannot – grant C-NBCU's request.

IV. EVEN IF THE FCC CONSIDERS THE C-NBCU PROPOSAL ON ITS MERITS, THE ADMINISTRATIVE PROCEDURE ACT PROHIBITS THE COMMISSION FROM VEERING OFF THE COURSE ESTABLISHED IN THE MERGER ORDER

A. The FCC Cannot Simply Abandon the Recently-Adopted Merger Order

Pursuant to the APA, the Commission cannot disregard its own rules or decisions without providing a reasoned explanation for the change. Given the specificity of the Commission's focus in the *Merger Order* on how it intended to address the potential competitive harms of the Comcast-NBCU merger, there would be no logical explanation for a radical change in course now, barely more than a year following consummation of the transaction. Indeed, the Commission issued the *Merger Order* after an exhaustive, twelve-month analysis. The record in the proceeding consisted of hundreds of thousands of pages. More than ten thousand comments were submitted by public advocacy groups, C-NBCU competitors and numerous individual citizens. After considering this voluminous feedback, the FCC determined that the merger posed "substantial" potential harms, including "inhibit[ing] potential competition." Specifically,

See, e.g., Pirlott v. NLRB, 522 F.3d 423, 432 (D.C. Cir. 2008) ("Where an agency departs from established precedent without a reasoned explanation, its decision will be vacated") (internal citation omitted); Clinton Memorial Hospital v. Shalala, 10 F.3d 854, 859 (D.C. Cir. 1993) (if agency wants to pursue a "change in course," it must do so deliberately and "articulate[] permissible reasons" for the change).

Merger Order, 26 FCC Rcd at 4240; id. at 4342 ("The identified harms generally involve situations in which the transaction would allow the Applicants to obtain or exercise market power").

when it came to the online video market, the Commission found that C-NBCU "would also have the incentive and ability to hinder the development of rival online video offerings and inhibit potential competition from emerging online video distributors that could challenge Comcast's cable television business."

As part of its effort to neutralize those perceived harms, the FCC adopted a provision permitting an OVD to pursue commercial arbitration in the event that it were to reach a bargaining impasse with C-NBCU over access to online video programming. The arbitration condition adopted in the *Merger Order* reflects a highly specific approach, first requiring Comcast and OVDs to negotiate in good faith, and then putting in place a two-phase arbitration procedure with detailed rules and procedures. The condition contemplates the potential exposure of highly confidential information only in the narrow context of an actual arbitration, and even then, only if ordered by an arbitrator – in which case disclosure would be subject to a restrictive protective order that limits access exclusively to outside counsel and outside experts.

The C-NBCU Proposal now seeks to fundamentally upend this structure, marginalizing the *Merger Order*'s arbitration conditions and discarding for all practical purposes the Commission's model protective order. That C-NBCU seeks such sweeping change is apparent on the face of its Proposal. Where the Commission established a structure to encourage good faith negotiations, with the arbitration conditions available as a last resort, Comcast and NBCU would force OVDs (and by implication, affected third parties) into a posture in which the

⁴³ *Id.* at 4240.

See id. at Appendix A; see also id. at 4342 ("the conditions we impose in this Order are designed to neutralize those possible negative impacts").

See *id.* at Appendix A, Sections VII-VIII (commercial arbitration remedy); *id.* at Appendix E (model protective order).

⁴⁶ See Merger Order, 26 FCC Rcd at Appendix E.

final remedies of the conditions are invoked in the first instance. In other words, rather than reserving risky discovery and disclosure only for intractable disputes, the C-NBCU Proposal would result in disclosure of highly confidential information, including to C-NBCU insiders, every time an OVD seeks to rely on the Benchmark Condition, rendering meaningless the cautious, step-by-step approach of good faith negotiation and arbitration.

The arbitration condition in the *Merger Order* specifies that the parties are to negotiate in good faith, and "[i]f negotiations fail to produce a mutually acceptable set of price, terms and conditions," an OVD may pursue arbitration.⁴⁷ Further, the condition requires that a cooling-off period be observed, "during which negotiations shall continue."⁴⁸ If and only if there remains an impasse would the parties engage in a two-stage arbitration over (i) whether the Benchmark Condition had been triggered, and (ii) whether the terms of their proposed programming agreement were fair.⁴⁹ But if an OVD were compelled to show all of its cards to C-NBCU up front, as the C-NBCU Proposal contemplates, there could not possibly be a dispute as to whether the first prong of the Benchmark Condition had been triggered, i.e., whether the OVD was "qualified" by virtue of having an agreement with a "peer" company. Hence, phase one of the arbitration remedy provided for in the *Merger Order* would become mere surplusage. This cannot be what the Commission intended, or else it would not have explicitly provided for a two-phase arbitration.⁵⁰

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(cont'd)

⁴⁷ *Id.* at Appendix A.

⁴⁸ *Id*.

⁴⁹ See id.

See Communications Corp. v. FCC, 128 F.3d 735, 739 (D.C. Cir. 1997) (barring the FCC from interpreting its regulations in a way which violates the "familiar principle of statutory interpretation which requires construction 'so that no provision is rendered inoperative or superfluous, void or insignificant'") (internal citation omitted). See also Nat'l Ass'n of Homebuilders v. Defenders of Wildlife, 551 U.S. 644, 669 (2007)

Likewise, even beyond the question whether the Benchmark Condition's predicate requirement has been triggered, the forced sharing – at the outset of negotiations – of unredacted copies of OVD programming agreements would moot the notion of good faith negotiations to establish fair market value. Rather than negotiate based on marketplace considerations, C-NBCU would simply go through the motions before ultimately picking and choosing the most economically advantageous terms and conditions available from among the OVD's exposed agreements. This would leave an OVD with no prospect of achieving a better deal out of negotiations with C-NBCU than the OVD obtained from one of the Content Companies. The whole purpose of phase two of the arbitration, however, is to serve as a backstop to encourage the negotiating process, since failure to reach a deal based on marketplace considerations exposes each party to the risk that an arbitrator might select the other's best offer. Permitting C-NBCU to have knowledge up front about the OVD's other deal(s) – knowledge, of course, that would not be reciprocal for the OVD – would make a mockery of the idea of a marketplace negotiation.

Most egregious, the protective order proposed by C-NBCU would obviate completely the model protective order adopted in the *Merger Order*. If C-NBCU in-house business personnel already have had access to highly confidential information at the beginning of the process, the restrictive protections imposed in the Commission's protective order would be irrelevant. The FCC's plan to prohibit access to confidential information by anyone other than outside counsel and outside experts would, by this time, be completely undermined.

⁽cont'd from previous page)

^{(&}quot;On the dissent's reading, [the regulation's] reference to 'discretionary' federal involvement is mere surplusage, and we have cautioned against reading a text in a way that makes part of it redundant").

It merits mention that C-NBCU's proposed new protective order contemplates that all confidential materials be submitted to the FCC as well.⁵¹ This would put the Commission in the untenable position of warehousing substantial amounts of confidential data, which in turn would subject it to a potentially ongoing stream of requests for access. The concentration of such a large volume of sensitive information raises the specter of harmful disclosures to parties with the power to use the information for improper purposes. This risk is heightened given that even inadvertent disclosures cannot force the recipients of the information to "unlearn" all of the trade secrets to which they have been privy. Once that damage is done, it cannot be cured. There is no reason for the Commission to take on this burden.

Beyond the fact that it would mark an abrupt departure from the *Merger Order*, the C-NBCU Proposal also would result in the FCC abandoning substantial precedent wherein it has limited disclosure of confidential business information to outside counsel and outside experts. Indeed, the Commission consistently has recognized the potential harms stemming from release of sensitive commercial data to competitors' internal business personnel. For this very reason, even in those limited cases where it has contemplated the disclosure of confidential programming agreements, the FCC has restricted access to outside counsel and outside experts.

Quite clearly, then, the C-NBCU Proposal would represent a complete transformation of the approach set forth in the *Merger Order*, and a striking shift away from the

⁵¹ See C-NBCU Proposal, at Attachment A, ¶ 6.

See, e.g., In re Game Show Network, LLC, 26 FCC Rcd 16100 (2011) (authorizing only outside counsel and consultants to review highly confidential information); In re DISH Network L.L.C., 25 FCC Rcd 15227 (2010); In re Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp. et al., 20 FCC Rcd 20073 (2005); In re EchoStar Communications Corp., 17 FCC Rcd 7415, 7416 (2002) (limiting access to highly confidential information "to outside counsel of record, their employees, and outside consultants and experts who they retain to assist them in this proceeding").

⁵³ See id.

FCC's "outside"-eyes-only precedent. The Commission, however, may not take such a drastic step – literally discarding its own specifically-chosen approach – without providing a reasoned explanation for the change. With respect to an order barely more than one year old, and in the complete absence of any evidence of changed circumstances, the Commission could not possibly present a reasoned explanation for the radical about-face that C-NBCU seeks.

B. C-NBCU Has Offered No Evidentiary Basis for the Commission's Purported Need to Abruptly Depart From the *Merger Order*

In its February 17, 2012 letter, C-NBCU asserts that it "cannot comply with its obligation to share any equivalent content license for a requesting OVD without appropriate disclosure of the baseline peer deal that [NBCU] is expected to match."⁵⁴ From this assertion, C-NBCU pivots to claim that its proposal is somehow necessary to effectuate the FCC's goals in the *Merger Order*.⁵⁵ This claim does not hold up to scrutiny, and it cannot serve as a reasoned explanation for an extreme change of course by the Commission.

Incredibly, Comcast and NBCU filed the letter – in which they assert that absent grant of their proposal, OVD negotiations "likely [will] result in arbitration proceedings in most cases" – just 11 days before submitting to the Commission a report that paints a starkly different picture of the landscape. In particular, in its February 28, 2012 annual report documenting compliance with all of the transaction conditions set forth in the *Merger Order*, C-NBCU stated unequivocally that NBCU "has received many … requests [for online video programming distribution licenses] from OVDs for film, broadcast, and cable programming." ⁵⁷

⁵⁴ C-NBCU Proposal, at 1-2.

⁵⁵ *See id.* at 2.

⁵⁶ *Id*.

⁵⁷ Annual Compliance Report, at 8-9.

Furthermore, C-NBCU reported that "[t]he majority of these OVDs have relied on the so-called 'Benchmark Condition'." Most importantly, NBCU acknowledged that it "has negotiated and executed license agreements with several OVDs on mutually agreeable commercial terms without resort to the specific processes of the Conditions." After detailing at least five examples, the C-NBCU compliance report confirmed that, "[a]s of January 28, 2012, only one OVD had filed a formal demand for arbitration" pursuant to the *Merger Order*. 60

These facts wholly contradict C-NBCU's assertion that its Proposal is necessary to ensure that the Benchmark Condition works as intended. If C-NBCU's sense of urgency were based in fact, one would expect to find numerous OVDs seeking arbitration to resolve the supposedly nettlesome question of whether the Benchmark Condition has been triggered. But that has not happened. If anything, the disconnect between the compliance report and the sky-isfalling rhetoric of C-NBCU's letter suggests that the Proposal may just be an attempt to refashion the Benchmark Condition into a less onerous obligation.

Ironically, the C-NBCU Proposal would take the kind of liberties with highly confidential information of third parties that C-NBCU steadfastly has opposed at every juncture when its own sensitive agreements have been at risk. In this very proceeding, Comcast went out of its way to urge the Commission to ensure enhanced protection for its documents in the protective orders governing the FCC's review of the proposed transaction. At the time,

⁵⁸ *Id*.

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⁵⁹ *Id*.

Id. (also noting that even with respect to "that demand," NBCU said it has "continued to make progress in good faith negotiations with the OVD").

See Letter from Michael H. Hammer, Counsel for Comcast Corporation, to William T. Lake, Chief, Media Bureau, FCC, MB Docket No. 10-56 (filed Apr. 29, 2010); Letter from Michael H. Hammer, Counsel for Comcast Corporation, et al., to William T. Lake, Chief, Media Bureau, FCC, MB Docket No. 10-56 (filed Apr. 27, 2010).

Comcast asserted that its confidential information deserved enhanced protection since it consisted of "some of Applicants' most sensitive business information," and that "[d]isclosure of this material to Applicants' competitors and/or parties with whom Applicants do business . . . would have a serious negative effect on their businesses and place Applicants at a significant competitive disadvantage." Thus, Comcast requested that no competitor's in-house personnel be permitted to review Comcast's highly confidential programming agreements. 63

Comcast has been equally resolute in other proceedings:

- Less than two months ago, Comcast joined its SpectrumCo LLC partners and other Applicants in a pending spectrum transfer proceeding in arguing to the Commission that the Applicants' commercial competitors should not be allowed to "leverage" a Commission proceeding "to gain access to proprietary pricing and marketing information they would never have access to in the normal course "64 The Applicants went on to argue such information "could, if made available even subject to Protective Orders, inform decisions and negotiating tactics by competitors in other transactions, harming Applicants (and their customers)."65
- Just six months ago, Comcast characterized program carriage agreements as the "crown jewels" of the business, adding that this fact has long been "acknowledged by the Commission."
- A year earlier, the FCC issued a protective order in a proceeding after finding that "Comcast has provided adequate justification for its request [for enhanced confidential treatment], explaining with particularity why the information sought to be protected is so competitively sensitive that

Letter from Michael H. Hammer, Counsel for Comcast Corporation, et al., to William T. Lake, Chief, Media Bureau, FCC, MB Docket No. 10-56 (filed Apr. 27, 2010).

⁶³ See id.

Letter from Michael H. Hammer, Counsel to SpectrumCo LLC, et al., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4 (filed Feb. 9, 2012).

⁶⁵ *Id*.

In re Revision of the Commission's Program Carriage Rules, Comments of Comcast Corporation, MB Docket No. 11-131, at 34 (filed Nov. 28, 2011).

- additional protection is warranted and maintaining that such information is closely guarded and is not made available publicly."⁶⁷
- And in a proceeding last year in which Comcast was, like the Content Companies here, an innocent third party dragged into a dispute between an unrelated programmer and an unrelated MVPD, Comcast took the position that the FCC was obligated "to protect third parties from unauthorized, highly invasive and potentially harmful discovery of their highly confidential information."⁶⁸

There is no reason why the Content Companies' sensitive commercial information should receive any lesser degree of protection than Comcast wants for itself. It is clear that C-NBCU has not provided the Commission with any basis for changing course now (nor has C-NBCU bothered to explain why the Commission should deviate from the protective positions that Comcast itself has advocated for in the past).

C. Grant of the C-NBCU Proposal Would Be Highly Arbitrary and Capricious, As It Would Result in the Very Threat to Competition That the *Merger Order* Sought to Avoid

Finally, grant of the C-NBCU Proposal would contravene the APA prohibition on arbitrary and capricious agency decision-making.⁶⁹ In particular, it would be incongruous for the Commission to permit C-NBCU to use a condition meant to *protect* the marketplace against its power as the basis for enabling C-NBCU to obtain even *more* power – thereby facilitating the very competitive harms that the condition was intended to forestall. To allow C-NBCU now to obtain wide-ranging access to the Content Companies' highly confidential online distribution agreements – and especially to allow in-house business personnel to see their terms and

In re Wavedivision Holdings, LLC, 25 FCC Rcd at 2232 (reciting the severe competitive disadvantage that Comcast warned it would be subjected to if the Commission failed to grant its request for enhanced confidential treatment of its "most sensitive documents," including "contracts[] which contain information that is at the very heart of how Comcast Sportsnet conducts its business.").

⁶⁸ *Joint Petition for Declaratory Ruling*, at 10.

⁶⁹ See 5 U.S.C. § 706(2)(A).

conditions – would place C-NBCU in the exact position that the Merger Order classified as a fundamental threat to competition. That would be the epitome of arbitrary and capricious agency action.

Under its proposal, confidential materials would be handed over to C-NBCU under the guise of satisfying a condition that was intended to prevent C-NBCU from stifling competition. Yet an OVD that tries to avail itself of that condition would be forced to surrender its most confidential commercial secrets, knowing full well that it would be imperiling not just its own information, but also the most sensitive information of its business partners (in this case, the Content Companies). As one OVD has explained, online distributors' access to programming – wholly apart from NBCU – could be stifled if content providers become reluctant to enter deals under threat that their trade secrets would be made available to one of their chief competitors. The reality is that an OVD confronting this dilemma would have a strong disincentive against utilizing the purported "benefit" of the Benchmark Condition. It would be irrational for the Commission to endorse an outcome so wholly at odds with the intent of the Merger Order.

The D.C. Circuit has recognized the threat posed by arbitrary and capricious FCC disclosure actions. In Qwest Communications International, the court evaluated an attempt by the Commission to enforce an order requiring limited disclosure of confidential information to a regulated entity's competitors, which the FCC had adopted after finding that the balance of harms favored disclosure.⁷¹ The court, however, held that the Commission had not adequately

See Letter from Monica Desai, Counsel for Project Concord, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (filed Mar. 15, 2012) (noting that an OVD that violates the confidentiality provisions in its programming contracts "would seriously jeopardize [its] ability to obtain programming in the marketplace, thwarting the very purpose of the Benchmark Condition").

See Owest Communications International, Inc. v. FCC, 229 F.3d 1172, 1183-84 (D.C. Cir. 2000).

explained the apparent inconsistency with its history – and policy – of protecting confidential information.⁷² The court added that "[b]efore invoking its 'rare case' exception to its [audit] nondisclosure policy, the Commission must consider plausible alternatives and discount them before resorting to the release of raw audit data. Otherwise, Qwest's claim that the Order represents a standardless exemption from the Commission's policy and precedent gains force."⁷³

The D.C. Circuit's words ring true in this matter, since C-NBCU has not explained (nor could the FCC explain) why the disclosure contemplated by the C-NBCU Proposal is necessary now, when it was clearly not seen as necessary at the time of the *Merger Order*. Indeed, the *Annual Compliance Report* confirms that C-NBCU and OVDs can conclude negotiations without jeopardizing third parties' sensitive confidential information. And the Benchmark Condition protocol, as a fallback, permits the use of arbitration to address the rare instance in which direct negotiations are not successful. Importantly, as the FCC staff has confirmed in this proceeding, the pendency of C-NBCU's request for "clarification" is not "disrupting" the OVD arbitration condition, as the *Public Notice* has no bearing on an OVD's right to pursue arbitration.⁷⁴

Equally significant, as evidenced by the successful deals referenced in the *Annual Compliance Report*, C-NBCU will not suffer any injury if the Commission denies its Proposal.

Conversely, if the FCC goes along with the C-NBCU Proposal, the Content Companies would suffer severe and irreparable injuries. Any decision by the FCC resulting in broad disclosure

⁷² See id. at 1183-84.

⁷³ *Id.* (rejecting the Commission's claim that its protective order issued in Qwest's case would somehow adequately protect against the imminent competitive injuries).

⁷⁴ FCC OVD Benchmarking Condition Remains on Comcast/NBCU During Bureau Review, Communications Daily (Mar. 20, 2012).

would be particularly inappropriate here because the disclosure implicates the sensitive business information of *third parties* like the Content Companies, which have not sought any action from the FCC and which have not placed their own business dealings at issue.⁷⁵ Again, in light of the balance of equities, it would be arbitrary and capricious for the Commission to enable C-NBCU to pose the very threat to competition that the *Merger Order* was designed to prevent.

V. CONCLUSION

In sum, the Content Companies respectfully request that the Commission deny the C-NBCU Proposal in its entirety. C-NBCU's Proposal conflicts with law and policy protecting the confidentiality of business information, including the Trade Secrets Act. C-NBCU has presented no evidence to justify its request for a drastic departure from the *Merger Order*, and the Commission has no lawful basis for disturbing the decisions it reached in approving the transaction. Granting C-NBCU's request would unleash precisely the harms that the Commission feared might arise from the transaction, stifling the online video programming market and causing severe damage to innocent bystanders to this proceeding.

⁷⁵ Cf. 1996 Policy Statement NPRM, 11 FCC Rcd at 12418 ("The Commission generally has exercised its discretion to release [sensitive business] information only in very limited circumstances such as where a party placed its financial condition at issue in a Commission proceeding") (citation omitted).

Respectfully submitted,

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